No. 75-1053

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH W. JONES, PETITIONER

v.

THE RATH PACKING COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to this Court's order of April 19, 1976, inviting the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the question whether federal laws and regulations pertaining to net-weight labeling of pre-packaged meat and flour preempt California's net-weight labeling requirements for those foods.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Respondent Rath Packing Company is a meat processor subject to federal regulation under the Wholesome Meat Act of 1967, 81 Stat. 584, as amended, 21 U.S.C. 601 *et seq.* Among Rath's meat food products (see 21 U.S.C. 601(j)) is bacon, which the company packages in containers for ultimate retail sale (A. 69).

Respondents General Mills, Inc., the Pillsbury Company, and Seaboard Allied Milling Corporation manufacture, package, and sell wheat flour. Wheat flour is a "food" under the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301 *et seq.*, and a "consumer commodity" under the Fair Packaging and Labeling Act, 80 Stat. 1296, as amended, 15 U.S.C. 1451 *et seq.*

Respondents' bacon and wheat flour contain moisture when packaged. Unless bacon is packaged in a non-absorbent and airtight container, it loses moisture during distribution, both by absorption and evaporation (A. 61). Flour is hygroscopic and, unless packaged in an airtight container, may lose or gain moisture during distribution depending upon the ambient relative humidity (A. 32).

Since respondents do not use airtight containers for their bacon and flour, and since Rath uses absorbent packing materials for its bacon,[1] the net weight of

[1] There may be nutritional and ecological advantages to using absorbent rather than non-absorbent packing materials. See Brickenkamp, Hasko, and Natrella, *Checking Prepackaged Commodities—Revision of National Bureau of Standards Handbook 67*, p. 13 (July 1975 Draft).

the bacon and flour after packaging varies in accordance with the gain or loss of moisture during distribution.

2. The applicable federal legislation prohibits the distribution by respondents of packaged bacon or flour unless the package bears a label containing an accurate statement of the net weight of the contents. 15 U.S.C. 1453(a)(2); 21 U.S.C. 331(a), 343(e); 21 U.S.C. 601(n)(5), 610(b). Because the net weight of respondents' packaged bacon and flour varies in accordance with the gains or losses of moisture during distribution, respondents cannot ensure that the label's statement of net weight will correspond exactly to the actual net weight of the contents at all stages of the packing, shipping, and distribution process. A standard of "accuracy" in these circumstances can require a correspondence between actual and labeled net weight at only one time and place. If the correspondence exists at the prescribed time and place, then the label's statement of net weight is accurate regardless of reasonable variations attributable to subsequent gains or losses of moisture.

The federal regulatory scheme under the Meat, Food, and Labeling Acts requires correspondence between actual and labeled net weight at the time and place of packaging, and it permits such "[r]easonable variations" from the labeled net weight as are thereafter "caused by loss or gain of moisture during

the course of good distribution practices * * *." 9 C.F.R. 317.2(h)(2); 21 C.F.R. 1.8b(q).[2]

The regulations (set forth at Pet. App. 92-93) were promulgated by the Secretary of Agriculture and the Secretary of Health, Education, and Welfare pursuant to their authority under the Meat Act and the Food Act, respectively, to implement the statutory requirement of accuracy through regulations permitting "reasonable variations" from labeled net weight. 21 U.S.C. 601(n)(5); 21 U.S.C. 343(e). The HEW regulation, 21 C.F.R. 1.8b(q), was also promulgated under the Labeling Act, which, though it does not

[2] This scheme fosters the Congressional policies of promoting fair competition and assisting consumers to make fair value comparisons among competing products. See 15 U.S.C. 1451; 21 U.S.C. 602. If the regulatory scheme required that labeled weight correspond to actual weight at the time and place of retail sale regardless of any weight variations attributable to gain or loss of moisture, then two identically priced one-pound packages of flour, each having an actual net weight of one pound at the time of sale, might actually contain quite different quantities of flour. For example, one package might contain 15 percent moisture, the other only 10 percent moisture. The consumer who purchased the package containing more moisture, thinking that it was equal in value to the other package, would in fact receive a smaller quantity of flour.

The federal scheme, by contrast, requires that labeled weight correspond to actual weight at the time of packaging, when, because of the milling process, the moisture content of flour is uniformly 13 to 14 percent (A. 28-29). The result is that two one-pound packages of flour, accurately labeled at the time of packaging, will contain equivalent amounts of flour throughout the distribution process. Any actual weight differences between the two packages at the time of sale would be attributable to gains or losses of nutritionally valueless moisture during distribution.

explicitly provide for "reasonable variations" from labeled net weight, specifically authorizes the Secretary to promulgate regulations to excuse "full compliance" with otherwise applicable requirements if such compliance "is impracticable or is not necessary for the adequate protection of consumers * * *." 15 U.S.C. 1454(b).

The regulations also permit such reasonable variations from labeled net weight as are caused prior to shipment by "unavoidable deviations in good manufacturing practice * * *." 9 C.F.R. 317.2(h)(2); 21 C.F.R. 1.8b(q). Unlike variations caused by loss or gain of moisture during distribution—which can reduce or increase the total weight of an entire lot of packaged meat or flour—the deviations inherent in any manufacturing process result in slight differences in the actual weight of identically labeled packages within a lot but should not affect the total weight of an entire lot. In good manufacturing practice, the overfills and underfills are not unreasonably large and are clustered around a "target" or average weight that satisfies the standard of accuracy for the lot as a whole. See A. 86-89; Brickenkamp, Hasko, and Natrella, *Checking Prepackaged Commodities—Revision of National Bureau of Standards Handbook 67*, *supra*, at p. 8.

The California regulatory scheme invoked by petitioner and applied to respondents' products differs from the federal scheme both in the nature of its net-weight labeling standard and in the time and place at which the standard is applied. Whereas federal

law requires that the labeled weight correspond to the actual weight of the package's contents at the time and place of packaging and allows reasonable variations above or below the stated weight if those variations are caused by gain or loss of moisture during the course of subsequent good distribution practice, the California law applied by petitioner requires that "the average weight * * * of the packages or containers in a lot * * * shall not be less, at the time of sale or offer for sale, than the net weight * * * stated upon the package * * *." Cal. Bus. & Prof. Code § 12211 (1964).

The state scheme allows any variation in the lot average above the stated weight and forbids any variation in the lot average below the stated weight, without regard to the cause of those variations or their reasonableness in either direction.[3] California's sampling procedure for checking the lot average weight of packaged commodities leaves some room for statistical sampling errors. See Cal. Admin. Code, Title 4, Chapter 8, Subchapter 2, Article 5, § 2933.3.12 (a) and (b) (reproduced at Pet. App. 83-86). But

[3] Because the state standard relates to the lot average, weight variations among individual packages that might be caused by deviations in good manufacturing practice are implicitly permitted. But any individual package whose net weight is unreasonably less than the labeled weight is held to be in violation of the state standard and is subject to appropriate enforcement action. Cal. Admin. Code, Title 4, Chapter 8, Subchapter 2, Article 5, § 2933.3.12(c) (reproduced at Pet. App. 86-87).

the procedure makes no allowance for weight variations caused by gain or loss of moisture (A. 108).

3. It is the disparate regulatory treatment of weight variations caused by gain or loss of moisture that is primarily responsible for the conflict between the federal and state regulatory systems—a conflict that makes it impossible for meat processors and flour producers in respondents' situation to assure compliance with both the federal and the state net-weight labeling requirements.[4] Under settled pre-emption principles, the state scheme must yield to the federal to the extent of the conflict.

Even apart from the unavoidable clash of the two schemes, the state requirements are expressly pre-empted by the terms of the Meat Act and the Labeling Act. The Meat Act forbids the imposition by a state of any "[m]arking, labeling, [or] packaging * * * requirements in addition to, or different than, those

[4] Petitioner asserts that it is California's lot average sampling procedure that "may be the key to the lower Court's invalidation of the California statute and regulations" (Br. 16). Contrary to petitioner's view, however, nothing in the court of appeals' opinion forecloses the use of a statistically valid lot average sampling procedure. Federal net-weight inspections under the Meat Act, the Food Act, and the Labeling Act are themselves conducted pursuant to such a procedure. See United States Department of Agiculture, *Meat and Poultry Inspection Manual*, § 18.61(b)(2), pp. 168-174 (1973); Food and Drug Administration, *Inspection Operations Manual*, § 448 (1976). The court of appeals held only that the State may not, in applying its sampling procedure, disregard reasonable weight variations caused by gain or loss of moisture during the course of good distribution practice.

made under [the Meat Act]." 21 U.S.C. 678. The net-weight labeling standard established under the Act—correspondence between actual and labeled weight at the time of packaging, with reasonable variations allowed for loss or gain of moisture during distribution—is a "labeling requirement." Since California's standard—requiring that actual weight be "not less than" labeled weight at the time of sale, with no allowance for moisture variations—significantly differs from the federal requirement, it is barred by the Meat Act.

Similarly, the Labeling Act expressly supersedes state net-weight labeling laws that "are less stringent than or require information different from" the applicable federal standard. 15 U.S.C. 1461. California's regulation is "less stringent than" the federal because it allows the sale of overweight lots of packaged flour regardless of the reasonableness or cause of the variance from labeled weight. It "require[s] information different from" the federal because it provides that the label must show the minimum actual weight of a package of flour at the time of sale regardless of moisture loss, while under the federal standard the label must show the correct weight at the time of packaging, which may exceed, because of moisture loss, the actual weight at the time of sale.

ARGUMENT

The Federal Laws And Regulations Pertaining To Net-Weight Labeling Of Packaged Meat And Flour Preempt California's Net-Weight Labeling Requirements For Those Foods

1. California's regulatory scheme for the net-weight labeling of meat and flour conflicts irreconcilably with the federal scheme and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67. To satisfy California's requirement that the actual net weight of respondents' bacon and flour at the time of sale equal or exceed the labeled net weight, respondents would be forced to overpack their containers to the extent of the maximum foreseeable moisture loss during distribution. To do so, however, would violate federal standards requiring an accurate statement of the net weight of the contents at the time of packaging. For example, in order to satisfy California, a producer might have to pack one pound and two ounces in a package labeled "one pound," and that label would violate federal law.

Conversely, to satisfy federal accuracy standards, respondents would have to risk violating California law. A container that is accurately labeled as to net weight under federal standards at the time of packaging will predictably fail to comply with California's net weight standard at the time of sale if, as in the case of bacon and sometimes in the case of flour, the contents lose moisture during distribution.

It follows under the Supremacy Clause that petitioner may not properly enforce the net-weight labeling standard that he has invoked with respect to respondents' products. "[T]o the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution." *McDermott* v. *Wisconsin*, 228 U.S. 115, 132. Since the California law under which petitioner acted conflicts with the federal regulatory scheme under all three Acts, the court of appeals correctly held that the state law may not be enforced with respect to either of the products involved in this case.[5]

2. Even if there were no irreconcilable conflict between the different federal and state standards, the Supremacy Clause would nevertheless require subordination of the applicable state law, because Congress, in both the Meat Act and the Labeling Act, ex-

[5] Respondents argue (Br. 45-50) that California statutes and regulations, other than those under which petitioner acted, expressly adopt the statutory and regulatory standards for net-weight labeling established under the Meat Act, Food Act, and Labeling Act. We take no position here on the proper interpretation of California law. But if, as respondents suggest, the laws upon which petitioner based his enforcement actions have in fact been superseded by other state laws that explicitly incorporate the applicable federal standards, then the preemption issue in this case may actually involve a conflict, not between federal law and state law, but rather between federal law and one state official's misinterpretation of state law. In either event, for the reasons stated above, the conflict exists and must be resolved in favor of federal law under the Supremacy Clause.

pressly preempted all state laws establishing net-weight labeling requirements different from those established under the federal statutes.

(a) The Meat Act provides that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State." 21 U.S.C. 678. There is no question that that statute expresses "the clear and manifest purpose of Congress" (*Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230) to supersede state "marking, labeling, [and] packaging * * * requirements" that differ from those established for meat food products under the Meat Act. The only question is whether the net-weight labeling standard established under the Meat Act is a "marking, labeling, [or] packaging" requirement and whether, if it is, the California requirement is "in addition to, or different" from, the federal requirement.

The Act proscribes the sale or transportation of misbranded articles of meat food products. 21 U.S.C. 610(b). An article is "misbranded" if, *inter alia*, "its labeling is false or misleading in any particular" (21 U.S.C. 601(n)(1)) or the labeling of its package or container fails to show "an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count." 21 U.S.C. 601(n)(5)(B). These requirements that labels not be false and misleading and that they state quantity accurately are quintessential "labeling requirements."

In connection with the requirement that labels set forth an accurate statement of quantity, Congress pro-

vided that "reasonable variations may be permitted * * * by regulations prescribed by the Secretary [of Agriculture]." 21 U.S.C. 601(n)(5). The Secretary's regulation allowing "[r]easonable variations caused by loss or gain of moisture during the course of good distribution practices" (9 C.F.R. 317.2(h)(2)) amplifies the net-weight standard of 21 U.S.C. 601(n)(5)(B) and is part of the "labeling requirement" established by that provision.[6]

It follows that California's net-weight labeling requirement is expressly preempted by the Meat Act unless it is neither "in addition to" nor "different" from the federal requirement. 21 U.S.C. 678. We have already shown that the California requirement is significantly different from the federal: it establishes a net-weight standard of "not less than" the stated weight at the time of sale, in place of the fed-

[6] In opposition to this, petitioner argues that "[l]abeling is a matter of format, not of substance behind the label" (Br. 40), and therefore that, by definition, a requirement pertaining to the label's substantive accuracy is not a "labeling requirement" within the meaning of the Act. That argument, which might have force in a context where the only express statutory requirements pertaining to labeling related to format, would here require an unacceptably "strained and unnatural reading." *Chandler* v. *Roudebush*, No. 74-1599, decided June 1, 1976, slip op. 8. The Meat Act imposes requirements with respect to the substantive accuracy, as well as the format, of labels, and Congress must be understood to have used the phrase "labeling requirements" as referring to all requirements imposed with respect to labeling under the Act. That "plain, obvious and rational meaning" (*ibid.*) of the phrase must be preferred to petitioner's "curious, narrow, hidden" (*ibid.*) interpretation.

eral accuracy standard that permits reasonable variations below stated weight caused by loss of moisture prior to the time of sale. Federal law consequently preempts the state requirements with respect to the net-weight labeling of bacon, "because 'Congress has unmistakably so ordained' that result." *DeCanas* v. *Bica*, No. 74-882, decided February 25, 1976, slip op. 5, quoting from *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142.

Petitioner argues (Br. 36-40), however, that the Meat Act specifically authorizes his enforcement of California's different labeling requirements. He relies upon the portion of 21 U.S.C. 678 that allows a state, "consistent with the requirements under this chapter, [to] exercise concurrent jurisdiction with the Secretary over articles required to be inspected under [the Act], for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded * * *." That provision authorizes the state to undertake, concurrently with the federal government, efforts to enforce the *federal* labeling requirements. What is and what is not "misbranded" is determined by the definition of that term in 21 U.S.C. 601(n), not by the various interpretations given to the term by the separate states.

(b) The state regulatory scheme invoked by petitioner is preempted, insofar as it applies to wheat flour, by the Labeling Act. That Act provides that "it is the express intent of Congress to supersede any and all laws of the States * * * insofar as they may

now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." 15 U.S.C. 1461.

The court of appeals correctly held that "a state scheme is 'less stringent' than the federal scheme if it permits marketing of packages of flour that do not conform to the federal net weight labeling standards" (Pet. App. 48). Federal law requires that the label contain an accurate statement of net weight, subject to reasonable variations caused by loss or gain of moisture during distribution. Since California law permits the sale of packaged flour whose actual net weight exceeds the labeled net weight, regardless of the cause or amount of the variance, it is to that extent "less stringent than," and consequently superseded by, the federal requirements.

California law is also preempted insofar as it requires, with respect to the net-weight labeling of packaged flour, "information different from" that required by federal law. The information required by California is a statement of the minimum actual weight of the contents at the time of sale—*i.e.*, the labeled weight must equal or understate the actual weight—and no departure from that requirement (in terms of the lot average) is permitted for any reason. That information is "different from" the information required by federal law, which provides for an ac-

curate statement of net weight at the time of packaging and allows reasonable variations thereafter caused by moisture loss during distribution. A package whose contents weigh one pound at the time of packaging but only 15 ounces at the time of sale because of moisture loss during distribution must, under federal law, carry a label showing a net weight of one pound. Under California law, however, the label must show a net weight of 15 ounces or less.

It was precisely to avoid such conflicting requirements with respect to net-weight labeling that Congress expressly superseded state laws requiring information different from that required by federal law. Here, as in the case of the Meat Act, the state requirements must, to the extent of the conflict, yield to the federal under the Supremacy Clause, because "Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, 373 U.S. at 142.

3. Petitioner argues (Br. 19-20) that California's net-weight labeling standard is consistent with federal law (and therefore is not preempted) because it "is substantially similar to, and follows the principles of, Handbook 67, published by the National Bureau of Standards" (Br. 19). Even if consistency with a federal standard other than one prescribed under the Meat, Food, or Labeling Act were pertinent to the preemption inquiry in this case, petitioner's argument would fail because it rests on an erroneous premise. The California net-weight labeling requirement at issue here is at odds with the principles of

Handbook 67, as well as with the model state regulation to which the Handbook refers.

Handbook 67 was issued in 1959 by the National Bureau of Standards pursuant to the Bureau's authority (by delegation from the Secretary of Commerce) to "cooperat[e] with the States in securing uniformity in weights and measures laws and methods of inspection." 15 U.S.C. 272(5). The Handbook is "[a] manual for State and local weights and measures officials, describing a method for controlling various types of prepackaged commodities" (33 States Br. App. 5).[7] It is designed in part as a procedural guide for use in enforcing laws and regulations similar to the *Model State Weights & Measures Law* (1975) and the *Model State Packaging & Labeling Regulation* (1975), which have been adopted by the National Conference on Weights and Measures (an organization sponsored by the National Bureau of Standards and composed of state weights and measures officers).[8] The laws and regulations of many states

[7] "33 States Br. App." refers to the appendix to the brief *amicus curiae* of 33 States and Attorneys General, which was filed at the petition stage of this case. The appendix to that brief contains substantial excerpts from Handbook 67, a full copy of which we have lodged with the Clerk of this Court. We have also lodged the current draft of proposed revisions to Handbook 67 (referred to in note 1 and at page 5, *supra*), which was presented for review and comment to the National Conference on Weights and Measures in July 1975.

[8] Copies of the Model Law and the Model Regulation have been lodged with the Clerk.

parallel the Model Law, the Model Regulation, and Handbook 67.

The Model State Law, like the federal statutes and regulations discussed above and unlike the California law enforced by petitioner, provides that the director of weights and measures shall "[a]llow reasonable variations from the stated quantity of contents, which shall include those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice" (Section 5.15). The Model State Regulation—which is intended to be "compatible with appropriate Federal Regulations," including those adopted under the Labeling Act (Foreward)—provides that "[v]ariations from the declared net weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure" (Section 12.1.2).[9]

[9] Both the Model Law and the Model Regulation specify that the reasonable variations shall be allowed only after the commodity is introduced into intrastate commerce. However, the Regulation broadly defines the phrase "introduced into intrastate commerce" to refer to "the time and place at which the first sale and delivery of a package is made within the state, the delivery being either (a) directly to the purchaser or to his agent, or (b) to a common carrier for shipment to the purchaser" (Section 12.1.2). The Regulation would not permit exposure variations "so long as a shipment, delivery, or lot of packages of a particular commodity remains in the possession

Handbook 67 is wholly compatible with these principles. It reflects recognition that "[c]ertain packaged products * * * are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs" (33 States Br. App. 7). Referring to the provisions of the Model Regulation, the Handbook states that experienced inspectors should "be able to develop procedures for conducting a sound investigation that will result in the building up of working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture" (*id.* at 7-8).

Handbook 67 is thus in harmony with the net-weight labeling standards under the Meat, Food, and Labeling Acts and not with the standards under California law. California's regulation may prescribe

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or under the control of the packager or the person who introduces the package into intrastate commerce" (*ibid.*).

The Model Regulation also allows variations from the declared net weight "when caused by unavoidable deviations in weighing, measuring, or counting the contents of individual packages that occur in good packaging practice" (Section 12.1.1). It provides, however, consistent with federal regulations, that "such variations shall not be permitted to such extent that the average of the quantities in the packages of a particular commodity, or a lot of the commodity that is kept, offered, or exposed for sale, or sold, is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment, delivery, or lot compensate for such shortage" (*ibid.*).

a lot sampling procedure similar to the one suggested by Handbook 67 (see note 4, *supra*). But it differs from the Handbook, as it does from the federal law, in the one respect most relevant to the preemption issue: it fails to allow any variation from stated weight because of loss of moisture during the course of good distribution practice.

It is because of that failure that the California regulation may not properly be enforced with respect to respondents' products.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 217843 297